

REMARKS/ARGUMENTS

Applicants have again amended the claims in order to simplify prosecution and clarify the issues pending in the case. Claims 24 and 28 are canceled.

Rejections under 35 U.S.C § 102

The Office has maintained the rejection of Claim 20, and applied this rejection to the previously added Claim 27, as anticipated by Hespell. Applicants respectfully traverse this rejection.

Claim 20 includes the following elements absent from Hespell:

i) *an immunogenic composition* – there is no teaching in Hespell that the culture solutions disclosed therein would have any functionality as an immunogenic composition, and, further, the live cells and culture media of Hespell would preclude its use as an immunogenic composition;

(ii) *an immunologically effective amount of a bacteria belonging to the genus *Serpens** – while Hespell does disclose a *Serpens* species, *S. flexibilis*, Hespell does not teach or suggest that that species or any other species of *Serpens* bacteria could be used in an immunologically effective manner, or what would be an effective amount.

(iii) *a veterinarily acceptable diluent or carrier* – the Office contends that the use of distilled water as a component of a lactate broth comprises a veterinarily acceptable diluent or carrier. Nearly all of the ingredients added to lactate broth would be recognized by those of ordinary skill in the art as unacceptable contaminants for a veterinary composition. Thus, the lactate broth disclosed in Hespell is not “a veterinarily acceptable diluent or carrier”.

Because the Hespell reference does not disclose each and every element of claim 20, it does not anticipate the claim.

The arguments made in the Office Action regarding Claim 24 and the killed immunologically active portions are obviated by the cancellation of Claim 24.

Claim 27 should be patentable for the reason of the patentability of the claims from which they depend.

Based on the foregoing amendments and remarks, Applicants request that the Examiner reconsider and withdraw the rejections of Claim 20 under 35 U.S.C. § 102.

Rejection under 35 U.S.C § 112, ¶ 1 – Written Description

The Office further rejected Claim 20, and applied this rejection to the previously added Claim 27, as failing to provide an adequate written description of the invention.

The Office contends that the application does not adequately describe the *Serpens* genus based on the two disclosed members of the genus, *Serpens* spp. HBL-112 and *Serpens flexibilis*.

The Office Action particularly points out differences between the species, and asserts that “Applicants disclosure of two species with different properties is simply not commensurate in scope with the genus claim language given that the two species have distinct structures and activities”.

Applicants respectfully traverse this rejection on two grounds. First is the ground that the two species have many more similarities than differences, in fact it is their similarities that compels their classification as within the same genus. Applicants note particularly tables 1a and 1b in this regard.

Second is the ground that the if the two did not have measurably different attributes they would be the same species.

It is just the combination of similarities and subtle differences that define the genus and species relationship, and that provides one ordinarily skilled in the art with the necessary information to identify further species of the genus, and distinguish them from the existing species.

The aspect of the rejection regarding the phrase "immunologically active portions" is believed obviated by the cancellation of Claim 24 and amendment to Claim 20.

Based on the foregoing amendments and remarks, Applicants respectfully submit that the application is now in condition for allowance.

Included with this communication is a request for continued examination, and a check to cover the small entity fee of \$385 and the fee of \$475.00 for a 3 month extension of time to respond to the March 8, 2004 office action. Any additional fees required by this submission may be charged to deposit account 50-2767. If the Examiner has any questions regarding this communication or feels that an interview might facilitate prosecution of the application, he is invited to contact the undersigned at (916) 444-3900.

Respectfully submitted,

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